In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 756

S. JACOB SENS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* order of the Court of Appeals affirming the judgment of the district court (R. 161–162) has not been reported.

JURISDICTION

The order of the Court of Appeals was filed on April 13, 1954. The petition for a writ of certiorari was filed on May 12, 1954. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1). See also Rules 37 (b) (2) and 45 (a), Federal Rules of Criminal Procedure.

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QUESTIONS PRESENTED

1. Whether it was necessary in this case for the Government to prove a wilful failure to file an income tax return.

2. Whether the prosecution was barred by the statute of limitations.

STATUTE INVOLVED

Internal Revenue Code:

> SEC. 56. PAYMENT OF TAX.
>
> (a) *Time of payment.*—The total amount of tax imposed by this chapter shall be paid on the fifteenth day of March following the close of the calendar year, or, if the return should be made on the basis of a fiscal year, then on the fifteenth day of the third month following the close of the fiscal year.
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> (d) *Voluntary advance payment.*—A tax imposed by this chapter, or any installment thereof, may be paid, at the election of the taxpayer, prior to the date prescribed for its payment.
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> (26 U. S. C. 1946 ed., Sec. 56.)
>
> SEC. 145. PENALTIES.
>
> (a) [As amended by Sec. 5 (c), Current Tax Payment Act of 1943, c. 120, 57 Stat. 126] *Failure to file returns, submit information, or pay tax.*—Any person required under this chapter to pay any estimated tax or tax, or required by law or regula-

tions made under authority thereof to make a return or declaration, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any estimated tax or tax imposed by this chapter, who willfully fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

(b) *Failure to collect and pay over tax, or attempt to defeat or evade tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

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(26 U. S. C. 1946 ed., Sec. 145.)

SEC. 3748. PERIODS OF LIMITATION.

(a) *Criminal Prosecutions.*—No person shall be prosecuted, tried, or punished, for any of the various offenses arising under the internal revenue laws of the United States unless the indictment is found or the information instituted within three years next after the commission of the offense, except that the period of limitation shall be six years—

(1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner,

(2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof, and

(3) for the offense of willfully aiding or assisting in, or procuring, counseling, or advising, the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a false or fraudulent return, affidavit, claim, or document (whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document).

For offenses arising under section 37 of the Criminal Code, March 4, 1909, 35 Stat. 1096 (U. S. C., Title 18, § 88), where the object of the conspiracy is to attempt in any manner to evade or defeat any tax or the payment thereof, the period of limi-

tation shall also be six years. The time during which the person committing any of the offenses above mentioned is absent from the district wherein the same is committed shall not be taken as any part of the time limited by law for the commencement of such proceedings. Where a complaint is instituted before a commissioner of the United States within the period above limited, the time shall be extended until the discharge of the grand jury at its next session within the district.

(b) *Scope of Limitations.*—Subsection (a) of this section shall apply to offenses whenever committed; except that it shall not apply to offenses the prosecution of which was barred before June 6, 1932.

* * * * *

(26 U. S. C. 1946 ed., Sec. 3748.)

STATEMENT

On March 13, 1952, a complaint was filed against petitioner before a United States Commissioner charging him with wilful attempt to evade and defeat his income tax for the year 1945. (R. 1a, Pet. 19–20.) On April 23, 1952, a two count indictment was filed against petitioner in the United States District Court for the Northern District of Ohio charging him with wilful attempt to evade and defeat his income taxes for the years 1945 and 1946. (R. 11a–12a.) Upon motion of the United States Attorney, the 1946 count was thereafter dismissed. (R. 12a,

21a.) The 1945 count of the indictment alleged that petitioner attempted to defeat and evade his income taxes for 1945 by his failure to keep proper records of his business transactions during the calendar year 1945; by his failure to record and report brokerage commissions received by him and salaries received by him during the calendar year 1945; by his failure to properly record sales made by him during the calendar year 1945; by having bank accounts in various cities, to-wit, Lorain, Ohio, Cleveland, Ohio, and New York City, during the calendar year 1945; by having a bank account under the fictitious name of "J. Miller" with the Morris Plan Bank, Cleveland, Ohio, during the calendar year 1945, and by effecting withdrawals from that account in the amount of $15,000 with which he purchased $15,000 of United States Treasury coupon bonds under the fictitious name of "J. Miller"; and by his further wilful failure to file an income tax return for the calendar year 1945 although he had received net income in the sum of $100,919.83 upon which he owed an income tax of $68,957.84. (R. 11a.) After a jury trial lasting eight days, petitioner was found guilty (R. 77a), and on May 20, 1953, he was sentenced to imprisonment for two years and fined $3,000 (R. 79a). The Court of Appeals affirmed. (R. 161.)

The evidence to support the verdict may be summarized as follows:

During the entire course of the special agent's investigation commencing in 1947, petitioner was frequently asked whether he had any records and to produce what records he had. (R. 122). Not receiving any records from petitioner, the special agent proceeded to determine petitioner's net income by independent means. The special agent's analysis of certain bank accounts showed petitioner's total deposits in 1945, minus non-income items, to have been $333,130.43. (R. 123–124.) To determine the amount of petitioner's purchases, the special agent circularized all sugar refining companies and brokers located in Chicago, Cleveland and New York. Whenever leads were obtained, he contacted the persons involved and elicited information as to purchases made by petitioner. (R. 122.) In 1950 petitioner turned over to the special agent some of his cancelled checks for 1945. (R. 122.) From the information thus obtained the special agent determined that petitioner's purchases in 1945 amounted to $207,499.39. (R. 122–125.) After credit for miscellaneous expenses of $2,368.82, petitioner's net income was computed to be $101,419.83. (R. 125.) Not until the trial did petitioner produce a cash receipts and disbursements journal, nor was the special agent even aware of its existence until that time. (R. 129, 144.)

Much of the evidence at the trial involved petitioner's use of names other than his own. At one bank he applied for and received under the

name of "Clarence Behrendt" bonds costing $15,008.16. (R. 86–90.) Under the fictitious name of "J. Miller" he maintained a bank account from which he withdrew funds to purchase bonds costing $15,006.12. (R. 91–95.) He used the latter bonds (R. 112, 113) as collateral for a loan at a bank where he dealt in his and his wife's name (R. 95–96). He maintained bank accounts and did business under the names of "Lorain Foods" (R. 97–98), "Erie Trading Company" (R. 104, 108–111, 114), and "William Goldberg" (R. 111). Petitioner admitted all of these matters and stated that he used the assumed name of "J. Miller" to hide his black market transactions. (R. 115–119.)

A search in the records of eight collection districts indicated that petitioner had not filed an income tax return for 1945. (R. 115.) Petitioner's accountant testified to his preparing a return showing a tax liability in the sum of $42.95 (R. 134, 135, 147) but did not testify that he filed the return (R. 147). When interviewed several times during the investigation petitioner did not exhibit any return or check stub. (R. 148.) He gave no explanation as to why there was no record of the tax return being filed. (R. 148.)

From unreported net income in the sum of $101,419.83 it was determined that petitioner owed the Government $68,957.84 as income tax for the year 1945. (R. 131, 132.)

Upon a motion for judgment of acquittal it was argued that the Government failed to prove wilful failure to file an income tax return and that this was a necessary element of the crime charged. (R. 40a.) The trial court concluded that the argument was without merit (R. 145), although it noted that there was evidence susceptible of the inference that there was a wilful failure to file a tax return (R. 147–148).

ARGUMENT

1. Petitioner contends (Pet. 6–13) that the trial court erred in holding that wilful failure to file an income tax return is not an essential element of the crime charged here. Although this is a tax evasion case, he urges that to sustain conviction the Government must prove beyond a reasonable doubt that petitioner failed to file a return and that such failure was wilful. Despite undisputed proof of affirmative acts of concealment and a very substantial tax deficiency, petitioner argues that the Government's case must fail unless it is also established that there was wilful failure to file a return.

Spies v. *United States,* 317 U. S. 492, however, holds the contrary. In that case the defendant had been convicted of attempting to defeat and evade income tax in violation of Section 145 (b), *supra,* p. 3, and the judgment of conviction was affirmed on appeal. The defendant had requested that the jury be instructed to acquit if it found

only that he had wilfully failed to make a return and had wilfully failed to pay the tax due. This was refused. This Court reversed, holding that the defendant was entitled to a charge which would (p. 500)—

> point out the necessity for such an inference of willful attempt to defeat or evade tax from some proof in the case other than that necessary to make out the misdemeanors.

The Court sharply distinguished between the felony of wilful tax evasion and the misdemeanor of wilful failure to file a return. It stated, *supra,* pp. 497, 499:

> A felony may, and frequently does, include lesser offenses in combination either with each other or with other elements. We think it clear that this felony may include one or several of the other offenses against the revenue laws. But it would be unusual and we would not readily assume that Congress by the felony defined in § 145 (b) meant no more than the same derelictions it had just defined in § 145 (a) as a misdemeanor. * * * Congress did not define or limit the methods by which a willful attempt to defeat and evade might be accomplished and perhaps did not define lest its effort to do so result in some unexpected limitation. Nor would we by definition constrict the scope of the Congressional provision that it may be accomplished "in any manner".

Petitioner relies (Pet. 12) on *First Trust & Savings Bank* v. *United States,* 206 F. 2d 97 (C. A. 8th); but in that case it was found that the evidence did not show any affirmative acts of concealment. Petitioner also cites (Pet. 12) *Cave* v. *United States,* 159 F. 2d 464 (C. A. 8th), certiorari denied, 331 U. S. 847. In that case the Court of Appeals held that the indictment sufficiently charged an attempt to defeat and evade the tax through wilfully filing a false and fraudulent return. Proof of the 145 (a) misdemeanor together with affirmative acts of tax evasion, may constitute the basis for conviction under Section 145 (b). *Spies* v. *United States, supra; United States* v. *Smith,* 206 F. 2d 905 (C. A. 3d); *United States* v. *Croessant,* 178 F. 2d 96 (C. A. 3d); *Cave* v. *United States,* 159 F. 2d 464 (C. A. 8th), certiorari denied, 331 U. S. 847. It does not follow, however, that proof of tax evasion under 145 (b) cannot be made unless there is a showing of wilful failure to file a return.

2. Petitioner contends (Pet. 13–14) that the complaint filed on March 13, 1952, was barred by the statute of limitations, because the period began to run on January 1, 1946.

This argument is without merit. It ignores the fact that petitioner's income tax, while payable in advance if he chose to pay it, did not become due until March 15, 1946, and did not become deficient or actionable until the latter

duce. Section 56 (a) and (d), *supra*, p. 2. The Government must prove not only an attempt to willfully defraud it but also that a tax in addition to what the taxpayer had already paid, if any, remains due and owing. *United States* v. *Mazzei*, 176 F. 2d 328, 329 (C. A. 7th), certiorari denied, 338 U. S. 893; *Gleichman* v. *United States*, 80 F. 2d 398, 399 (C. A. 8), certiorari denied, 297 U. S. 709. The statute of limitations does not begin to run until the right to prosecute the action to a successful conclusion has completely accrued. *Arnold* v. *United States*, 75 F. 2d 249 (C. A. 9th); *Bowles* v. *United States*, 73 F. 2d 772 (C. A. 4th), certiorari denied, 296 U. S. 650.

The decision of the court below is clearly correct and there is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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